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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 JEREMY ESTEP,

7 Plaintiff,

8 v.

9 ELKO COUNTY SHERIFF, *et al.*,

10 Defendants.

Case No. 3:20-cv-00635-GMN-WGC

ORDER

11 Plaintiff, who currently is incarcerated in the custody of the Nevada Department of
12 Corrections (“NDOC”), has filed an amended¹ civil rights complaint pursuant to 42 U.S.C.
13 § 1983, and has filed an application to proceed *in forma pauperis*. (ECF Nos. 4, 7). The
14 matter of the filing fee will be temporarily deferred. The Court now screens Plaintiff’s First
15 Amended Complaint under 28 U.S.C. § 1915A.

16 **I. SCREENING STANDARD**

17 Federal courts must conduct a preliminary screening in any case in which an
18 incarcerated person seeks redress from a governmental entity or officer or employee of
19 a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify
20 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
21 claim upon which relief may be granted, or seek monetary relief from a defendant who is
22 immune from such relief. See *id.* §§ 1915A(b)(1), (2). *Pro se* pleadings, however, must
23 be liberally construed. See *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
24 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
25 elements: (1) the violation of a right secured by the Constitution or laws of the United
26

27
28 ¹ An amended complaint replaces an earlier complaint. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989). Therefore, the operative complaint here is the First Amended Complaint (ECF No. 7).

1 States; and (2) that the alleged violation was committed by a person acting under color
2 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, under the Prison
4 Litigation Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s
5 claim if “the allegation of poverty is untrue” or if the action “is frivolous or malicious, fails
6 to state a claim on which relief may be granted, or seeks monetary relief against a
7 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a
8 complaint for failure to state a claim upon which relief can be granted is provided for in
9 Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under
10 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a
11 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
12 the complaint with directions as to curing its deficiencies, unless it is clear from the face
13 of the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
14 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

15 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
16 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to
17 state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
18 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
19 756, 759 (9th Cir. 1999). In making this determination, the Court takes as true all
20 allegations of material fact stated in the complaint, and the Court construes them in the
21 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
22 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
23 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
24 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
25 must provide more than mere labels and conclusions. See *Bell Atl. Corp. v. Twombly*,
26 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
27 insufficient. See *id.*

1 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
2 that, because they are no more than mere conclusions, are not entitled to the assumption
3 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can
4 provide the framework of a complaint, they must be supported with factual allegations.”
5 *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity
6 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*
7 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
8 specific task that requires the reviewing court to draw on its judicial experience and
9 common sense.” *Id.*

10 Finally, all or part of a complaint filed by an incarcerated person may be dismissed
11 *sua sponte* if that person’s claims lack an arguable basis either in law or in fact. This
12 includes claims based on legal conclusions that are untenable (*e.g.*, claims against
13 defendants who are immune from suit or claims of infringement of a legal interest which
14 clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*,
15 fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989);
16 *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

17 **II. SCREENING OF FIRST AMENDED COMPLAINT**

18 In the First Amended Complaint (“FAC”), Plaintiff sues a deputy who he refers to
19 as both Deputy John Doe and Leahy. (*Id.* at 1, 2, 7). A defendant who is named cannot
20 also be a John Doe defendant. Therefore, the Court considers this defendant to be
21 Deputy Leahy. Plaintiff also sues an unnamed Elko County Sheriff. (ECF No. 7 at 2).
22 Plaintiff brings three claims and seeks monetary damages. (*Id.* at 7, 10).

23 **A. Claim 1**

24 Claim 1 alleges the following: Plaintiff was arrested on November 16, 2018. (ECF
25 No. 7 at 5). He was housed in a mental health center in the Elko County Jail on November
26 17, 2018. (*Id.*) He was housed while naked and with no possessions. (*Id.*) While Plaintiff
27 was sleeping, he heard his cell door open, and Deputy Leahy came running in and
28 immediately started hitting and kicking Plaintiff. (*Id.*) Deputy Leahy then tased Plaintiff.

1 (*Id.*) Plaintiff asserts that he was not a threat at any time. (*Id.*) Plaintiff concludes that
2 the Elko County Sheriff and Deputy Leahy violated the Eighth Amendment because
3 Plaintiff was housed naked with no possessions and was beaten. (*Id.*)

4 **1. Excessive Force Claims**

5 The Court notes that, when it screened the original complaint, it informed Plaintiff
6 that it could not tell whether the Eighth Amendment applied to his allegations or the
7 Fourteenth Amendment applied to his allegations, and the Court explained the types of
8 circumstances under which each amendment applied. (ECF No. 5 at 4-6). The Court
9 told Plaintiff that, in an amended complaint, he should allege facts sufficient to show
10 whether he was a pre-trial detainee or already had been convicted at the time of the
11 alleged events. (*Id.* at 6). In the FAC, Plaintiff does not state whether he was a pretrial
12 detainee or already had been convicted. He asserts in the FAC that it is his Eighth
13 Amendment rights that have been violated, but he alleges that he had been arrested the
14 day before the alleged events. (ECF No. 7 at 5). Because Plaintiff alleges that he was
15 arrested only the day before the alleged incidents, it appears that he was a pre-trial
16 detainee. Therefore, the Court will apply the Fourteenth Amendment. *Bell v. Wolfish*,
17 441 U.S. 520, 535 n. 16 (1971) (holding that a pretrial detainee is protected from
18 conditions constituting punishment under the Due Process Clause of the Fourteenth
19 Amendment, not the Eighth Amendment's Cruel and Unusual Punishment Clause).

20 As the Court previously explained², in *Kingsley v. Hendrickson*, 135 S.Ct. 2466
21 (2015), the Supreme Court held that a pretrial detainee states a claim for excessive force
22 under the Fourteenth Amendment if: (1) the defendant used the force purposely or
23 knowingly, and (2) the force purposely or knowingly used against the pretrial detainee
24 was objectively unreasonable. *Id.* at 2472-73. "Considerations such as the following may
25 bear on the reasonableness or unreasonableness of the force used: the relationship
26 between the need for the use of force and the amount of force used; the extent of the
27 plaintiff's injury; any effort made by the officer to temper or to limit the amount of force;

28 ² ECF No. 5 at 4-5.

1 the severity of the security problem at issue; the threat reasonably perceived by the
2 officer; and whether the plaintiff actively was resisting. *Id.* at 2473. The Court further
3 explained³ that, because vicarious liability is inapplicable to § 1983 suits, a plaintiff must
4 plead that each Government-official defendant, through the official's own individual
5 actions, has violated the Constitution. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Thus,
6 a defendant may not be held liable merely because a co-worker, employee, or
7 subordinate violated the Constitution.

8 The Court finds that Plaintiff states a colorable Fourteenth Amendment excessive
9 force claim against Defendant Leahy. According to the FAC, Defendant Leahy
10 intentionally beat, kicked, and tased Plaintiff even though he merely had been sleeping.
11 This is sufficient to state a colorable Fourteenth Amendment excessive force claim
12 against Defendant Leahy, and the excessive force claim therefore may proceed against
13 Leahy.

14 However, Plaintiff has not alleged any facts that would be sufficient to show that
15 the Elko County Sheriff used any force against him. The Court therefore dismisses with
16 prejudice the excessive force claim against the Elko County Sheriff, as amendment would
17 be futile.

18 2. Conditions of Confinement

19 In the FAC, Plaintiff now alleges that Deputy Leahy and the Elko County Sheriff
20 violated his Eighth Amendment rights because Plaintiff was naked with no "possessions."
21 As discussed above, the Court is applying the Fourteenth Amendment, not the Eighth
22 Amendment.

23 A pretrial detainee's claim against individual defendants based on the conditions
24 of confinement is evaluated under the Fourteenth Amendment's Due Process Clause.
25 *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018). Therefore, for a pre-trial
26 detainee to state a colorable conditions of confinement claim, the plaintiff must allege
27 facts sufficient to show:

28 ³ ECF No. 5 at 5-6.

1 (1) The defendant made an intentional decision with respect to the conditions
2 under which the plaintiff was confined;

3 (2) Those conditions put the plaintiff at substantial risk of suffering serious harm;

4 (3) The defendant did not take reasonable available measures to abate that risk,
5 even though a reasonable officer in the circumstances would have appreciated the high
6 degree of risk involved—making the consequences of the defendant's conduct obvious;
7 and

8 (4) By not taking such measures, the defendant caused the plaintiff's injuries.

9 *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc).

10 When considering the constitutionality of conditions of confinement, the court
11 should analyze each condition to determine whether that specific condition is
12 unconstitutional. *Cf. Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986).
13 However, some conditions of confinement may establish a constitutional violation in
14 combination when each would not do so alone, but only when they have a “mutually
15 enforcing effect that produces the deprivation of a single, identifiable human need such
16 as food, warmth, or exercise—for example, a low cell temperature at night combined with
17 a failure to issue blankets.” *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). When considering
18 the conditions of confinement, a court also should consider the amount of time to which
19 the prisoner was subjected to the condition. *Hearns v. Terhune*, 413 F.3d 1036, 1042
20 (9th Cir. 2005).

21 The Court finds that Plaintiff fails to state a colorable conditions of confinement
22 claim against the Elko County Sheriff. Despite the Court’s earlier screening order
23 informing Plaintiff that he must allege facts sufficient to show that the Elko County Sheriff
24 himself must violate Plaintiff’s rights to be held liable for a constitutional violation, Plaintiff
25 alleges no facts in this claim concerning the Elko County Sheriff. The Court therefore
26 dismisses the claim against the Elko County Sheriff with prejudice, as amendment would
27 be futile.
28

1 With regard to Defendant Leahy, the Court finds that Plaintiff fails to state a
2 colorable conditions of confinement claim. As an initial matter, the Court cannot
3 understand what Plaintiff means when he alleges that he had “no possession of any kind.”
4 The mere fact that Plaintiff may have had his possessions such as his keys and wallet,
5 removed upon his arrest would not be sufficient to state a colorable conditions of
6 confinement claim. Plaintiff does not allege facts sufficient to show that the cell was
7 entirely empty, and the Court cannot tell from the allegations what the conditions were in
8 the cell. Plaintiff does allege that he was naked. However, he does not allege how long
9 he was naked or what the other related conditions were, such as the temperature in the
10 cell or the presence of bedding. Plaintiff also does not allege how long he was placed in
11 the conditions. Thus, Plaintiff does not allege facts sufficient to show that he was at
12 substantial risk of suffering serious harm and does not allege facts sufficient to show what
13 harm, if any, he suffered. In addition, although Claim 1 refers to Leahy coming into
14 Plaintiff’s cell and beating him, the FAC does not allege facts that would be sufficient to
15 show that Leahy made any intentional decisions about the nature and duration of the
16 conditions in Plaintiff’s cell and that Leahy caused Plaintiff harm from those conditions.

17 The Court therefore dismisses without prejudice, and with leave to amend, the
18 conditions of confinement claim against Leahy. If Plaintiff chooses to amend the
19 conditions of confinement claim against Leahy, Plaintiff must clearly allege true facts
20 sufficient to show the conditions in the cell and the duration that Plaintiff was subjected to
21 those conditions. Those factual allegations must be sufficient to show a substantial risk
22 of harm to Plaintiff. The allegations must also be sufficient to show that the particular
23 defendant made intentional decisions to subject Plaintiff to the conditions that put Plaintiff
24 at serious risk of suffering serious harm, that the particular defendant did not appreciate
25 that risk even though a reasonable person would have appreciated that risk, that the
26 particular defendant responded unreasonably, and that the particular defendant caused
27 Plaintiff specified harm. Conclusory allegations will not be sufficient. If Plaintiff does not
28 believe that he can establish a conditions of confinement claim against Leahy, then he

1 should not amend the complaint to allege a conditions of confinement claim against
2 Leahy.

3 **B. Claim 2**

4 Claim 2 alleges the following: Plaintiff was injured by Deputy Leahy on November
5 17, 2018 and had blood coming out of his mouth. (ECF No. 7 at 6). Elko County Sergeant
6 Oldham asked Plaintiff if he was hurt, and Plaintiff told Oldham that his jaw hurt and his
7 arm was swollen. (*Id.*) Oldham told Plaintiff “you will be fine.” (*Id.*) To this day, Plaintiff
8 has problems with his jaw. (*Id.*) Every time he eats this brings him pain. (*Id.*) Plaintiff
9 concludes that Oldham was deliberately indifferent, in violation of the Eighth Amendment,
10 by not getting him treatment for his injuries. (*Id.*)

11 The Court notes that, in the original complaint, Claim 2 alleged that it was the Elko
12 County Sheriff who asked Plaintiff if he was hurt and said that he would be fine. (ECF
13 No. 1-1 at 5). In the FAC, Plaintiff now is alleging that it was a Sergeant Oldham, not the
14 Elko County Sheriff, who did this. (ECF No. 7).

15 However, Plaintiff has not named Oldham as a defendant in this action. As the
16 Court previously explained⁴, a plaintiff may not hold a defendant vicariously liable for the
17 constitutional violations committed by the defendant’s subordinates or co-workers; a
18 plaintiff must plead that the particular defendant, through his own actions, violated the
19 Constitution. Count II does not allege any facts that would show a constitutional violation
20 by Leahy or the Elko County Sheriff. Count II therefore necessarily does not state a
21 colorable claim against any defendant. Accordingly, the Court dismisses with prejudice
22 Claim 2 to the extent Plaintiff seeks to state a claim against Leahy or the Elko County
23 Sheriff. Plaintiff may not pursue Claim 2 against either Leahy or the Elko County Sheriff.

24 Out of an abundance of caution, the Court will, however, give Plaintiff one last
25 chance to amend this claim to state a claim against the proper defendant. If Plaintiff
26 chooses to amend Claim 2 to state a claim against Sergeant Oldham, he must name
27 Sergeant Oldham as a defendant. He also must allege true facts sufficient to show that
28

⁴ ECF no. 5 at 5-6.

1 Oldham was deliberately indifferent to his serious medical needs, in violation of the
2 Fourteenth Amendment.

3 It will not be enough for Plaintiff to allege that his jaw was injured by Leahy and
4 that he still suffers pain in the jaw. A pretrial detainee's Fourteenth Amendment due
5 process claim regarding medical care is evaluated under an objective deliberate
6 indifference standard. *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018).
7 The elements of such a claim are: "(i) the defendant made an intentional decision with
8 respect to the conditions under which the plaintiff was confined; (ii) those conditions put
9 the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take
10 reasonable available measures to abate that risk, even though a reasonable official in the
11 circumstances would have appreciated the high degree of risk involved—making the
12 consequences of the defendant's conduct obvious; and (iv) by not taking such measures,
13 the defendant caused the plaintiff's injuries. *Id.* at 1125. "With respect to the third element,
14 the defendant's conduct must be objectively unreasonable, a test that will necessarily
15 'turn[] on the facts and circumstances of each particular case.'" *Id.* (quoting *Castro v.*
16 *County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016)). A plaintiff must "prove
17 more than negligence but less than subjective intent—something akin to reckless
18 disregard." *Id.* The mere lack of due care is insufficient. *Id.* Thus, if Plaintiff chooses to
19 amend the complaint to include Oldham as a defendant and state a claim against him,
20 Plaintiff must allege true facts that would be sufficient to establish these elements against
21 Oldham. Conclusory allegations will not be sufficient. If Plaintiff does not believe that he
22 can establish a claim against Oldham, then he should not amend Claim 2.

23 C. Claim 3

24 In Claim 3 of the FAC, Plaintiff asserts that he was denied access to the courts by
25 sheriff's deputies or the sheriff himself denying him grievance forms to be able to exhaust
26 his remedies concerning matters such as the incident with Deputy Leahy. (ECF No. 7 at
27 7).
28

1 Plaintiff's allegations in Claim 3 of the FAC essentially are the same as his
2 allegations in Claim 3 of his original complaint. As the Court told Plaintiff when it screened
3 his original complaint⁵, to establish a violation of the right of access to the courts, a
4 prisoner must establish that he or she has suffered an actual injury, a jurisdictional
5 requirement that flows from the standing doctrine and may not be waived. *Lewis v.*
6 *Casey*, 518 U.S. 343, 349 (1996). An "actual injury" is "actual prejudice in court. *Lewis*,
7 518 U.S. at 348. Plaintiff did not allege any such injury in his original complaint and does
8 not allege any such injury in the FAC. He does not allege that the failure to obtain
9 grievance forms resulted in a court dismissing any claim in any case. In fact, he is
10 bringing claims in this action and none of them have been dismissed for failure to exhaust
11 claims. The Court therefore dismisses the access to the courts claim with prejudice, as
12 amendment would be futile.

13 **D. Leave to Amend**

14 Plaintiff is granted leave to file a second amended complaint to cure the
15 deficiencies of the conditions of confinement claim against Deputy Leahy and to add
16 Sergeant Oldham as a defendant and amend Claim 2 to state a colorable Fourteenth
17 Amendment claim against Sergeant Oldham for deliberate indifference to serious medical
18 needs. If Plaintiff chooses to file a second amended complaint, he is advised that an
19 amended complaint supersedes (replaces) the original complaint and, thus, the second
20 amended complaint must be complete in itself. See *Hal Roach Studios, Inc. v. Richard*
21 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that "[t]he fact that a party
22 was named in the original complaint is irrelevant; an amended pleading supersedes the
23 original"); see also *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding
24 that for claims dismissed with prejudice, a plaintiff is not required to reallege such claims
25 in a subsequent amended complaint to preserve them for appeal). If Plaintiff files a second
26 amended complaint, he may not include any of the claims that the Court has dismissed
27 with prejudice.

28

⁵ ECF No. 5 at 9.

1 If Plaintiff files a second amended complaint, he should file it on this Court's
2 approved prisoner civil rights form, and it must be entitled "Second Amended Complaint."
3 For each cause of action and each Defendant, he must allege true facts sufficient to show
4 that the particular Defendant violated Plaintiff's civil rights. Plaintiff may not amend the
5 complaint to add unrelated claims against other defendants. Furthermore, an amended
6 complaint does not include new claims based on events that have taken place since the
7 original complaint was filed.

8 The Court notes that, if Plaintiff chooses to file a second amended complaint curing
9 the deficiencies, as outlined in this order, Plaintiff must file the second amended complaint
10 within 30 days from the date of entry of this order. If Plaintiff does not timely file an
11 amended complaint curing the stated deficiencies, this action will proceed immediately
12 against Defendant Leahy on the Fourteenth Amendment excessive force claim only.

13 **III. CONCLUSION**

14 It is therefore ordered that a decision on Plaintiff's application to proceed *in forma*
15 *pauperis* (ECF No. 4) is deferred.

16 It is further ordered that the operative complaint is the First Amended Complaint
17 (ECF No. 7), and the Clerk of the Court will send Plaintiff a courtesy copy of the First
18 Amended Complaint.

19 It is further ordered that the Fourteenth Amendment excessive force claim against
20 Defendant Leahy may proceed.

21 It is further ordered that the Fourteenth Amendment conditions of confinement
22 claim against Defendant Leahy is dismissed without prejudice, and with leave to amend.

23 It is further ordered that any cause of action against Defendant Leahy in Claim 2
24 is dismissed with prejudice, as amendment would be futile. Plaintiff may not pursue this
25 claim.

26 It is further ordered that Claim 3 is dismissed with prejudice, as amendment would
27 be futile. Plaintiff may not pursue Claim 3.
28

1 It is further ordered that all of the claims against the Elko County Sheriff are
2 dismissed with prejudice, as amendment would be futile. Plaintiff may not pursue these
3 claims.

4 It is further ordered that Plaintiff has leave to amend the FAC to add Sergeant
5 Oldham as a defendant and amend Claim 2 to allege true facts sufficient to state a
6 colorable Fourteenth Amendment claim against Sergeant Oldham for deliberate
7 indifference to serious medical needs.

8 It is further ordered that, if Plaintiff chooses to file a second amended complaint,
9 Plaintiff shall file the second amended complaint within 30 days from the date of entry of
10 this order.

11 It is further ordered that the Clerk of the Court shall send to Plaintiff the approved
12 form for filing a § 1983 complaint and instructions for the same. If Plaintiff chooses to file
13 a second amended complaint, he should use the approved form and he must write the
14 words "Second Amended" above the words "Civil Rights Complaint" in the caption.

15 It is further ordered that, if Plaintiff chooses to file a second amended complaint,
16 the Court will screen the second amended complaint in a separate screening order. The
17 screening process may take many months.

18 It is further ordered that, if Plaintiff does not file a timely second amended
19 complaint, this action shall proceed immediately against Defendant Leahy on the
20 Fourteenth Amendment excessive force claim only.

21
22 DATED THIS 14 day of July 2021.

23
24 
25 _____
26 GLORIA M. NAVARRO
27 UNITED STATES DISTRICT JUDGE
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